

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF HAWAII

3 UNITED STATES OF AMERICA, ) CR 05-00027 JMS  
4 )  
5 Plaintiff, ) Honolulu, Hawaii  
6 ) March 3, 2006  
7 vs. ) 9:30 a.m.  
8 )  
9 (02) ERIC K. HOE, ) 1) Sentencing to Count 1 of  
10 ) the First Superseding  
11 Defendant. ) Indictment  
12 ) 2) Plaintiff United States  
13 of America's Motion for  
14 Downward Departure  
15

16 TRANSCRIPT OF PROCEEDINGS  
17 BEFORE THE HONORABLE J. MICHAEL SEABRIGHT  
18 UNITED STATES DISTRICT JUDGE

19 APPEARANCES:

20 For the Plaintiff: MARK A. INCIONG, ESQ.  
21 Office of the United States Attorney  
22 PJKK Federal Building  
23 300 Ala Moana Blvd., Suite 6100  
24 Honolulu, Hawaii 96850  
25 For the Defendant CRAIG T. KIMSEL, ESQ.  
(02) Eric K. Ho: Attorney at Law  
888 Mililani Street, Suite 700  
Honolulu, Hawaii 96813  
Official Court Reporter: Sharon Ross, CSR, RPR, CRR  
United States District Court  
300 Ala Moana Blvd., Room C-283  
Honolulu, Hawaii 96850  
(808) 535-9200

26 Proceedings recorded by machine shorthand, transcript produced  
27 with computer-aided transcription (CAT).

EXHIBIT C

1 FRIDAY, MARCH 3, 2006

9:30 A.M.

2 COURTROOM MANAGER: Criminal No. 05-00027 JMS, United  
3 States of America versus Defendant (02) Eric K. Ho.

4 This case is called for a Sentencing as to Count 1 of  
09:52AM 5 the First Superseding Indictment.

6 MR. INCIONG: Good morning, Your Honor. Mark Inciong  
7 for the United States.

8 THE COURT: Yes, good morning.

9 MR. KIMSEL: Good morning, Your Honor. Craig Kimsel  
09:52AM 10 for Eric Ho. He's present next to me.

11 THE COURT: All right. Good morning. And for the  
12 record, Mr. Kimsel, I did receive a series of letters from you  
13 this morning, including a letter -- two-page letter from Mr. Ho  
14 and a series of other letters which I have read in chambers  
09:52AM 15 before coming out.

16 MR. KIMSEL: Thank you, Judge.

17 THE COURT: All right. Let me first ask you then,  
18 Mr. Kimsel and Mr. Ho, if you've both had an opportunity to  
19 read, review and discuss the presentence report and any  
09:52AM 20 addendum and make any and all objections you wish to the  
21 report.

22 MR. KIMSEL: Yes, Your Honor. We've -- I've gone over  
23 it with Mr. Ho over at the Federal Detention Center. We made  
24 objections which are included within the report. We have no  
09:53AM 25 further objections to it.

1 THE COURT: All right. Is that correct, Mr. Ho?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. Thank you. You may be seated.

4 On September 30th of 2005, Mr. Ho pled guilty to

09:53AM 5 Count 1 of the first superseding indictment charging him with  
6 conspiracy to possess with intent to distribute 50 grams or  
7 more of methamphetamine.

8 Now, I have read the presentence investigation report;

9 and at this time I will accept the Rule 11(c)(1)(A) plea

09:53AM 10 agreement because I am satisfied that the agreement adequately  
11 reflects the actual offense behavior and accepting the  
12 agreement will not undermine the statutory purposes of  
13 sentencing.

14 I will place the report itself under seal in the

09:53AM 15 record. If an appeal is taken, of course, counsel will have  
16 access to the report other than the confidential recommendation  
17 section.

18 All right. Now, turning to the report, I understand,

19 as to the factual findings in the report, not the guideline  
09:54AM 20 calculations, but the factual findings, neither party has any  
21 objections; is that accurate?

22 MR. KIMSEL: That's correct, Your Honor. We have no  
23 objections.

24 MR. INCIONG: That's correct, Your Honor.

09:54AM 25 THE COURT: All right. As to the application of the

1 guidelines to the facts, Mr. Inciong, I understand the  
2 government has no objections?

3 MR. INCIONG: No objections.

4 THE COURT: All right. Now, Mr. Kimsel, you did make  
09:54AM 5 an objection regarding Paragraphs 38 and 40 relating to two  
6 prior convictions and Judge Del Rosario's subsequent ruling  
7 that wasn't reflected in the initial report.

8 Has that been satisfied? Has that been corrected to  
9 your satisfaction at this point?

09:54AM 10 MR. KIMSEL: Yes, Your -- yes, it has, Your Honor. I  
11 believe it did not change the initial calculations of the  
12 guideline, but I thought it was important to have at least the  
13 correct disposition of the case reflected in the PSI --

14 THE COURT: Well, so do I.

09:54AM 15 MR. KIMSEL: -- and it has been.

16 THE COURT: Okay. So, you have no remaining  
17 objections as to the guideline calculations then?

18 MR. KIMSEL: None of the report, Your Honor.

19 THE COURT: All right.

09:54AM 20 MR. KIMSEL: We will be asking for a further downward  
21 departure.

22 THE COURT: I understand that; but I'm just, right  
23 now, starting with where we are within the advisory guidelines.

24 MR. KIMSEL: Yes, Your Honor.

09:55AM 25 THE COURT: Okay. With that, then, the Court does

1 adopt the factual findings in the presentence report as its own  
2 and the conclusions as to applicable guidelines as its own.

3 So, the Court determines that the applicable advisory  
4 guidelines are as follows: Total offense level, 34; criminal  
09:55AM 5 history category VI; a guideline advisory imprisonment range of  
6 262 months to 327 months with a 20-year mandatory minimum.  
7 Supervised release is ten years, and that's a mandatory  
8 minimum.

9 If I grant the government's motion for downward  
09:55AM 10 departure, of course, I can go below the mandatory minimum both  
11 for the prison term and supervised release.

12 Fine range is \$17,500 to 8 million, and there's a  
13 mandatory \$100 special assessment.

14 Do both counsel concur with those advisory guideline  
09:55AM 15 ranges and mandatory minimums?

16 MR. INCIONG: Yes, Your Honor.

17 MR. KIMSEL: For Eric Ho, yes, Your Honor.

18 THE COURT: All right. Now, Mr. Inciong, I'll hear  
19 from you first, then, on the motion for downward departure.

09:56AM 20 MR. INCIONG: Your Honor, we would ask that you grant  
21 our motion for a downward departure pursuant to Section 5K1.1  
22 for the defendant's substantial assistance. As stated in our  
23 papers, we believe that his assistance resulted, in part, in  
24 the guilty plea by co-defendant No. 3, who is Zuleika Carter.  
09:56AM 25 So, we are asking for a two-level downward departure and --

1 which would also then affect the 20-year mandatory minimum that  
2 is applicable at this time.

3 THE COURT: All right. Mr. Kimsel, just on whether to  
4 grant the motion or not, do you have anything to add? I'm  
09:56AM 5 prepared to --

6 MR. KIMSEL: Please, Your Honor.

7 THE COURT: Okay. With that plea, then I will grant  
8 the motion. So, the motion for downward departure is granted.

9 Now, what that does, of course, is it essentially  
09:56AM 10 viciates the mandatory minimum in this case which allows the  
11 Court and gives the Court discretion it would not otherwise  
12 have to sentence below the 20-year mandatory minimum.

13 What I will do now, Mr. Kimsel, is hear from you on  
14 your allocution on behalf of Mr. Ho; and then I'll hear from  
09:57AM 15 Mr. Ho and then from Mr. Inciong.

16 MR. KIMSEL: Thank you, Your Honor. Your Honor, we're  
17 asking that you depart further downward in this matter. Eric  
18 Ho, from the beginning, has cooperated. I believe that's  
19 reflected within the presentence investigation report. He  
09:57AM 20 immediately made a statement implicating Zuleika Carter who  
21 wasn't just his co-defendant either. This is his long-time  
22 companion. They have a child together that was born while the  
23 defendant's been in custody. It was a difficult decision for  
24 him to make, but it shows that he's taken the right steps.

09:57AM 25 You know, he's lived a life -- it's unfortunate,

1 really. You know, it's sad. You know, I mean, he was born  
2 into a -- Don Ho's family -- you know, that's his  
3 grandfather -- to his -- Don Ho's daughter at an early age. I  
4 believe that's reflected in her letter.

09:58AM 5 His upbringing -- during his -- during his upbringing,  
6 he didn't have much contact with his mother because she was  
7 always off doing her thing, which is, I believe, related to  
8 drugs also. And that's the kind of background he's come from.

9 He got in some trouble in '91 in those burglary cases  
09:58AM 10 and a drug possession case; but since '91 when he was convicted  
11 of the three crimes that make him a repeat -- well, a career  
12 criminal, basically, he's not had any other serious charges  
13 brought against him. That was a long time ago.

14 And even back then -- and that's why I thought it was  
09:58AM 15 important to have the PSI corrected to reflect that he was  
16 placed back on probation by Judge Del Rosario. Having been  
17 given an open term, the judge saw in him something that made  
18 him believe that Eric could -- could benefit with something  
19 less than a ten-year prison term and put him back on the five  
09:59AM 20 years of probation, which he completed.

21 THE COURT: He may have been better off with the ten  
22 years. He wouldn't be here today facing over 20 years.

23 MR. KIMSEL: I understand that, Judge.

24 I guess my point is that Eric -- he can do well. It's  
09:59AM 25 in him. You know, he's -- and he did well. That's why the --

1 Judge Del Rosario reconsidered it, waited a year to see how he  
2 did when he was in custody, was satisfied that Eric was making  
3 the right improvements and put him back on probation.

4 You know, the fact that he was caught with these  
09:59AM 5 drugs, it was probably the best thing that ever happened to  
6 him, you know? I mean, how could that be, you know? Well, it  
7 finally put an end in his life to this other world that he  
8 lived in, you know, this drug world.

9 He believed himself almost to be invincible. You  
10:00AM 10 know, I believe that's part of the addiction to crystal  
11 methamphetamine. It gives the person using it a sense that  
12 everything -- they're untouchable basically, Teflon on them.

13 And Eric's now gotten out from underneath that, and  
14 he's going to pay for it. I mean, he pled guilty in this case  
10:00AM 15 pursuant to a plea agreement that required -- that was -- the  
16 plea agreement was a prerequisite to his cooperation in this  
17 case. And he went forward; and he took the plea agreement so  
18 that he could cooperate, knowing full well that there was no  
19 guarantees of anything on the government's side, that he was  
10:00AM 20 facing a 20-year mandatory minimum. But he put his faith in it  
21 and he moved forward with it and he pled guilty before this  
22 Court, knowing full well those ramifications.

23 So, the fact that he took out his girlfriend in this  
24 case and implicated her was really something more than a  
10:01AM 25 two-level downward departure should reflect. It was a -- it



1 was a point in his life where he has to put aside his personal  
2 relationships, his drug culture, his immersion in that, and he  
3 stepped out of it.

4 And he's -- since then he's tried to do the right  
10:01AM 5 thing. We've tried to cooperate with the government. He  
6 hasn't been able to. I mean, it's always difficult for  
7 somebody who's in custody to do anything to get greater  
8 downward departures.

9 And then he had a tragedy of timing with his  
10:01AM 10 cooperation. I mean, we were ready to cooperate earlier on.  
11 We might have been able to do something substantial, but then  
12 he got in some administrative trouble at the FDC and was  
13 precluded from coming out to cooperate.

14 And when that finally lifted, his girlfriend took a  
10:02AM 15 run for it. Zuleika Carter ran. And so, that just destroyed  
16 all of his opportunities to further cooperate until recently.

17 We did debrief last week at the FDC with an FBI agent.  
18 I have received a letter this morning that is on my desk; and  
19 from my -- what I understand, it's -- there's a good  
10:02AM 20 possibility that Mr. Ho could testify in that matter.

21 THE COURT: In the Carter --

22 MR. KIMSEL: That's correct -- in Corn, in the Corn  
23 matter. And I believe it's U.S. versus James Corn.

24 THE COURT: Oh, okay.

10:02AM 25 MR. KIMSEL: Yeah.

1 THE COURT: Where is Ms. Carter now? What's her  
2 status?

3 MR. KIMSEL: I believe she's in state custody -- but  
4 I'm not really sure -- is what I understood.

10:02AM 5 MR. INCIONG: She is, Your Honor. She was arrested  
6 for some state forgery charges. She's in custody on that  
7 charge. There's, of course, a writ as soon as she's done with  
8 that matter to be brought into federal custody where she is  
9 pending sentencing.

10:03AM 10 THE COURT: Right. Okay.

11 MR. KIMSEL: So, throughout this case, Eric's tried to  
12 cooperate; and perhaps here at the end he may have gotten  
13 something that the government can use. I mean, he's been at  
14 the doorstep. He's thrown himself on the mercy of the United  
10:03AM 15 States in this matter on the two-level downward departure that  
16 they're asking for.

17 He also suffers -- I want to point this out; but he  
18 also suffers from a disease that he got from his mother's side  
19 of the family -- or, I'm sorry, his father's side of the family  
10:03AM 20 called Joseph's disease. And it makes Mr. Ho difficult to  
21 understand at times as if his tongue is swollen. It slowly  
22 deteriorates the body. His father died -- his grandfather died  
23 from it.

24 (Counsel and the Defendant confer.)

10:03AM 25 MR. KIMSEL: Yeah, his grandfather died from the

1 disease. It is terminal. And he's got to face that, too,  
2 while serving a lengthy prison sentence.

3 It all -- you know, Your Honor, we're asking that you  
4 sentence Eric to a ten-year term of imprisonment. That is a  
10:04AM 5 long time; but it would reflect the fact that he believes in  
6 himself that he could move forward in this world outside of the  
7 drug culture that he's been in. And I believe it would reflect  
8 the seriousness of his offense, and it would suit the pursuit  
9 of justice in this case.

10:04AM 10 THE COURT: All right. Mr. Ho, this is your  
11 opportunity to address the Court.

12 THE DEFENDANT: I have to start out apologizing for  
13 what brought me here. I was wrong, and it will never ever  
14 happen again.

10:05AM 15 Since 1990 -- that was my last felony charges that I  
16 committed, and since then I feel like I have -- I have changed.

17 My grandpa was supposed to be here today; but I guess  
18 he had a heart attack, you know, that heart attack. He fell in  
19 his -- while he was eating, and he busted his head. He's in  
10:05AM 20 the hospital again.

21 But it wasn't easy growing up in that family. It was  
22 like a business, a lot of drugs around. My initial drug charge  
23 that I'm being -- that's being used against me was from 1990.  
24 And I was put on probation, but I kept violating my probation  
10:06AM 25 by using -- using drugs. And that's another disease in itself.

1 And I have two -- two boys that I love, and I've been  
2 there for them. I made a big mistake. I'd like to ask for the  
3 mercy of this -- of the Court.

4 It's -- I'll do -- I'll cooperate -- I'll do anything  
10:06AM 5 for the Federal Government to help reduce my time. It was hard  
6 for me to debrief on my girlfriend. We're still together; but  
7 when the agents came and debriefed me, they wanted my honesty  
8 and -- which I -- which I was completely honest with them.

9 And that disease that he talks about, it's a  
10:07AM 10 neurological disorder where it -- first, it takes your speech.  
11 That's what -- I always speak like this. My -- my slurred  
12 speech is a symptom of the disease. And it progresses -- from  
13 age 31 to 37 is when the symptoms really hit you. It's an  
14 incurable disease. It's called Joseph-Machado disease. And  
10:07AM 15 your vision starts going, and your coordination goes.

16 And I never -- I was never really diagnosed with it  
17 because when I went to doctors, they don't really know much  
18 about it; but it's starting to hit now, if you look on the  
19 Internet and stuff.

10:08AM 20 But my dad is dying from it. His dad died from it,  
21 and his brother died from it also. So, it's a -- it's a  
22 disease that I'd like to try and address in prison, find some  
23 kind of medication for it but -- whatever can be found.

24 But I just ask for your understanding and your  
10:08AM 25 fairness. I'm not a stupid guy. I'm intelligent. Like I

1 said, my -- I always talk like this. It's because of the  
2 disease, the slurred speech.

3 And I heard that there's three classes of the disease,  
4 A, B and C. And B is -- the B class is what I think I have.

10:08AM 5 It progresses from 31 to 37; and by 45, even, you're bedridden.  
6 And that's -- that, I think, is the one I have because the  
7 symptoms are going rapidly on me.

8 But -- and the drugs didn't help. And I just -- I  
9 never going to touch that stuff ever again, never again, never  
10:09AM 10 ever again. I hate -- I hate what the drugs did to me, what  
11 they do to me; and I just ask for your mercy.

12 THE COURT: All right. Thank you, Mr. Ho.

13 Mr. Inciong?

14 MR. INCIONG: Thank you, Your Honor, just a few points  
10:09AM 15 to address, Your Honor.

16 In regard to the defendant's criminal history, while  
17 it's true that his last conviction -- scoreable conviction was  
18 1991, I mean, it's difficult to -- to rack up that kind of  
19 criminal history and to become a career offender. I mean,  
10:10AM 20 that's something you earn over a period of time.

21 So, in addition to that, you know, I don't really  
22 agree with the fact that well -- you know, my last conviction  
23 was 15 years ago, you know, that I've been basically -- the  
24 insinuation being I've been a model citizen since then. I  
10:10AM 25 mean, obviously Mr. Ho was engaged in the drug distribution of,

1 you know, significant quantities for an extended period of time  
2 before he was arrested. So, I don't think there was this, you  
3 know, long gap of model or noncriminal behavior that can really  
4 be pointed to.

10:10AM 5 In regard to, you know, his family situation, I mean,  
6 I have no doubt there were -- there were difficulties there  
7 that Mr. Ho encountered and so forth; but, you know, the  
8 argument could also be made that Mr. Ho had privileges and  
9 opportunities that a lot of people didn't have by growing up in  
10:10AM 10 that family as well. So, I don't think that's necessarily a  
11 basis to depart downward either.

12 In regard to his cooperation, I mean, you know, I  
13 truly believe Mr. Ho did everything that he could. There were  
14 in this case, I think, opportunities for -- for much greater  
10:11AM 15 assistance than he gave; but through, you know, faults of his  
16 own -- and he -- Mr. Ho at times just couldn't tow the line.  
17 And those opportunities dropped by the wayside as time went by.

18 I'm sure it was difficult for him to, you know,  
19 basically dime out his girlfriend; but, again, I don't think  
10:11AM 20 that enters into the calculation. I mean, the substantial  
21 assistance is in the results; and I don't think necessarily who  
22 you're cooperating against, by family relation or otherwise, is  
23 really something that enters into that.

24 You know, Mr. Carillo, his co-defendant, was -- he's  
10:11AM 25 already been sentenced. The government recommended six levels

1 for his cooperation, which ended up being something like in the  
2 neighborhood of 23 months, I think, is what it dropped his  
3 sentence down to.

4 THE COURT: Well, I think it was higher than that. I  
10:12AM 5 looked it up this morning. 37 months.

6 MR. INCIONG: 37 months.

7 THE COURT: But, of course, he had --

8 MR. INCIONG: Well, I mean, 37 months is what he got;  
9 but he was facing 70 so --

10:12AM 10 THE COURT: Well, I think his was 70 to 87 months.

11 MR. INCIONG: Right. So, it was about a 23 -- you  
12 know, he got about a couple years in credit. So, Mr. Ho --  
13 although, you know, obviously he's facing much more time, part  
14 of that is due to his criminal history. Even though it's two  
10:12AM 15 levels, the actual time off is going to be much greater than  
16 Mr. Carillo got, who assisted the government more  
17 significantly. So, we think the two levels is appropriate at  
18 this time.

19 There, you know, appear to be other further  
10:12AM 20 opportunities which are still available in this other case that  
21 the government will address happily with a Rule 35, if they  
22 should pan out.

23 I have -- I do not object to sentencing Mr. Low to  
24 the -- Mr. Ho to the low end of the range that we have  
10:13AM 25 recommended, which is 210 months. I think that, you know, more

1 than adequately covers any of the points that he brought up  
2 today, which I don't think individually substantiate any  
3 downward departure; but maybe collectively they do. So, we  
4 don't have any objection to the low end based on that. So, our  
10:13AM 5 recommendation is 210 months.

6 THE COURT: All right. You don't dispute the medical  
7 condition, I take it?

8 MR. INCIONG: Well -- and thank you. I did want to  
9 address that. I -- and that's one thing I will leave with the  
10:13AM 10 Court because I don't dispute that at all. I don't know a lot  
11 about the disease; but it sounds, you know, like it's -- it's  
12 obviously a hereditary disease that it's just going to be a  
13 matter of time that Mr. Ho is going to have to deal with a --

14 THE COURT: Okay.

10:13AM 15 MR. INCIONG: -- a more serious consequence.

16 THE COURT: All right. All right. Thank you,  
17 Mr. Inciong.

18 Mr. Kimsel, I'll give you the last word, if you wish.

19 MR. KIMSEL: Your Honor, I think Mr. Ho says that, you  
10:13AM 20 know, better than I ever could, you know, about his remorse,  
21 having gone down this road, what brought him here before you.  
22 I think him to be sincere in his pledge never to repeat the  
23 conduct that brought him here. I think he'll do his time as a  
24 model prisoner.

10:14AM 25 And he'll do a lot of time. You know, we're not --



1 even what I'm asking for is a lot of time. And we'd just ask  
2 the Court take all that into consideration and -- and give him  
3 a sentence that is fair and just.

4 THE COURT: All right. Thank you.

10:14AM 5 All right. Well, I have looked at all of this,  
6 obviously, in chambers. The one factor I was unaware of in any  
7 detail until today was the -- I don't know the full name --  
8 Joseph's disease.

9 THE DEFENDANT: Joseph-Machado.

10:14AM 10 THE COURT: Machado.

11 THE DEFENDANT: Joseph -- Joseph-Machado disease.

12 THE COURT: Machado disease.

13 THE DEFENDANT: Yeah.

14 THE COURT: And in looking at that, Mr. Inciong, I  
10:14AM 15 think, if there's no downward departure motion, I might go down  
16 closer to the 240 months as a result of that. I just think a  
17 sentence over 20 years with someone of Mr. Ho's age with this  
18 disease, looking at 3553(a), there really wouldn't be a need, I  
19 think, to go below -- below that.

10:15AM 20 Now, my understanding of the law -- and both of you  
21 can speak up if you think I'm wrong about this -- I really  
22 can't consider that in going below 240 months. In other words,  
23 I think -- I think I'm limited in the departure motion from  
24 that point down. I think it's fair for me to consider the  
10:15AM 25 personal characteristics and so forth going down to 240, within

1 that guideline range, looking at 3553. I don't know that  
2 that's really a fair consideration below 240 because the only  
3 thing that gives me authority to go below 240 is the  
4 government's motion for downward departure based on substantial  
10:15AM 5 assistance.

6 So, I think I need to base then the amount of  
7 departure based on the assistance. What I'm saying is I think  
8 I can consider these 3553(a) factors to get down to a mandatory  
9 minimum of 240 months, which I would do without a motion. I  
10:16AM 10 would sentence him to 240 months.

11 From there going down forward, though, I think really  
12 I'm limited legally to considering the substantial assistance.  
13 Does anyone disagree with that as a matter of law?

14 MR. INCIONG: I don't disagree, Your Honor. I think  
10:16AM 15 that's correct.

16 MR. KIMSEL: Well, Your Honor, I would disagree with  
17 that. You know, I think the Court has the discretion to  
18 consider whatever factors it deems appropriate in crafting a  
19 down -- once the government's moved -- and it's their sole  
10:16AM 20 discretion to so move for the downward departure originally.  
21 Once they've done so, I believe the Court can consider any  
22 factors it deems relevant in giving a further downward  
23 departure to Mr. Ho. I don't believe the Court's constrained  
24 just to go down to the 20-year mandatory, that the government's  
10:16AM 25 motion allows the Court to escape underneath that.

1 THE COURT: All right. Well, I disagree. I think  
2 that where a mandatory minimum is in play, the Court can use  
3 its discretion to get to that mandatory minimum. And below  
4 that -- I'm authorized to sentence below that because the  
10:17AM 5 government has filed a motion based on substantial assistance.  
6 And so, I'm looking at essentially departing downward from 240  
7 months then, Mr. Inciong, is the way I'm looking at it for  
8 purposes of this.

9 And so, what I will do is state my intended sentence,  
10:17AM 10 Mr. Kimsel, based on that. So, based on the information  
11 provided to me from Mr. Inciong and from yourself and your  
12 client regarding the cooperation, the Court is intending to  
13 sentence Mr. Ho to 180 months of incarceration.

14 That's to be followed -- now, I'm no longer tied to  
10:17AM 15 the ten years of supervised release. That just seems to me too  
16 long in this case. So, I'm going to say five years of  
17 supervised release; no fine because I don't believe that Mr. Ho  
18 has the ability to pay a fine and -- or part of the costs of  
19 incarceration or supervised release and to impose a fine would  
10:17AM 20 simply be an undo hardship on him; a \$100 special assessment  
21 and conditions of supervision as follows:

22 One, that he abide by the standard conditions of  
23 supervision; two, that he not commit any crimes, federal, state  
24 or local; three, that he not possess illegal controlled  
10:18AM 25 substances; four, that he cooperate in the collection of DNA as

1 directed by the Probation Office; five, that he refrain from  
2 any unlawful use of a controlled substance and shall submit to  
3 one drug test within 15 days of commencement of supervision and  
4 at least two drug tests thereafter, but no more than 15 valid  
10:18AM 5 drug tests per month during the term of supervision; six, that  
6 he participate in and comply with substance abuse treatment,  
7 which includes drug and alcohol testing, in a program approved  
8 by the Probation Office and is to refrain from the possession  
9 and/or use of alcohol while participating in substance abuse  
10:18AM 10 treatment.

11 I notice the condition is not here about possession of  
12 a firearm, ammunition or destructive device.

13 PROBATION OFFICER: Right. I'm sorry, Your Honor.

14 THE COURT: Yeah, I think that was just a mistake.

10:18AM 15 So, you shall not possess a firearm, ammunition or any other  
16 type of destructive device. And you shall submit your person,  
17 residence, place of employment or vehicle to a search conducted  
18 by U.S. Probation at a reasonable time and in a reasonable  
19 manner based upon reasonable suspicion of contraband or  
10:19AM 20 evidence of a violation of a condition of supervision. Failure  
21 to submit to a search may be grounds for revocation. And  
22 Mr. Ho shall warn any other resident that the premises may be  
23 subject to search pursuant to this condition.

24 Now, what I've looked at in going down from the 240  
10:19AM 25 months is -- I think Mr. Inciong is generally correct that who

1 he cooperated against -- it was a girlfriend -- isn't an  
2 overriding factor certainly; but I do take into account that  
3 Mr. Ho cooperated early. And I'm sure it wasn't easy to  
4 cooperate against a girlfriend. That's got to be more  
10:19AM 5 difficult than cooperating against someone out there that you  
6 don't know.

7 So, I do believe that there is some additional credit  
8 to be given him; and I certainly want to send the message out  
9 that those that cooperate early and earnestly and against  
10:20AM 10 everyone available, including someone like a girlfriend, will  
11 receive credit for that. I think that's an appropriate message  
12 to send that the Court does take that sort of matter into  
13 consideration.

14 But certainly the departure is not a -- you know, 50  
10:20AM 15 percent departure, it's nothing of that sort. I'm not going  
16 down to the ten years you sought, Mr. Kimsel.

17 MR. KIMSEL: Yes, Your Honor.

18 THE COURT: I just don't think, in considering the  
19 factors in 3553(a) and looking at the cooperation actually  
10:20AM 20 provided here, that a sentence of -- in the range of ten years  
21 is appropriate either. So, I do find 180 months to be  
22 appropriate.

23 Now, does either counsel have any legal reason as to  
24 why sentence should not be imposed as stated?

10:20AM 25 MR. INCIONG: None from the government, Your Honor.

1 MR. KIMSEL: None from the defense, Your Honor.

2 THE COURT: All right. So, the sentence will be  
3 imposed as stated.

4 MR. KIMSEL: Your Honor, we would ask that you  
10:20AM 5 recommend a drug program for Mr. Ho.

6 THE COURT: All right. Well, we're not there quite  
7 yet.

8 MR. KIMSEL: Oh, thank you, Judge.

9 THE COURT: First of all, there are no counts to  
10:21AM 10 dismiss, is that right, Mr. Inciong?

11 MR. INCIONG: No, Your Honor.

12 THE COURT: All right.

13 MR. INCIONG: Not to this defendant.

14 THE COURT: All right. Let me do this first then.  
10:21AM 15 Let me inform you, Mr. Ho, that you have entered into a plea  
16 agreement which waives most of your rights to appeal your  
17 sentence. Such waivers are generally enforceable; but if you  
18 plead -- believe that the appeal waiver is not enforceable or  
19 if you believe that you can appeal a matter not waived in your  
10:21AM 20 plea agreement, then you must do so within ten days of entry of  
21 judgment. Failure to file an appeal within ten days of entry  
22 of judgment is a waiver of your right to appeal. The  
23 government retains its right to appeal.

24 You certainly can talk to Mr. Kimsel about that. If  
10:21AM 25 you can't afford counsel, one would be appointed for you free

1 of charge to prosecute any appeal you wish.

2 Now, what I intend to state on the form that I fill  
3 out regarding recommendations is that -- that Mr. Ho is  
4 suffering from this disease and for the Bureau of Prisons to  
10:21AM 5 take that into account.

6 Mr. Kimsel, if you wish to provide me a letter -- and  
7 you should do it quickly, by Monday, close of business -- that  
8 sets forth in more detail any information regarding this  
9 letter, I'll be happy to include that in what I provide to the  
10:22AM 10 Bureau of Prisons.

11 MR. KIMSEL: Yes, Your Honor, a letter addressing this  
12 Joseph-Machado disease?

13 THE COURT: That's -- that's it. That's all I want.

14 MR. KIMSEL: That's right.

10:22AM 15 THE COURT: And you could have that delivered over to  
16 the Court; and then I can include that in the information I  
17 provide.

18 MR. KIMSEL: Thank you, Your Honor.

19 THE COURT: All right. There is certainly -- there  
10:22AM 20 are certainly different types of facilities, Mr. Ho. I don't  
21 know if you've looked into this. And, you know, you may not  
22 need an actual medical center at this point; and it may be that  
23 you'd be designated to a facility like Terminal Island which  
24 isn't a medical center and, yet, has sort of a better medical  
10:22AM 25 facility than most facilities.

1 But, of course, they would progress -- keep track of  
2 the disease as it progresses; and then if a medical center is  
3 required, that can be looked at at that point in time.

4 MR. KIMSEL: Thank you, Your Honor.

10:23AM 5 THE COURT: If the disease progresses, as you feel it  
6 might, to where you're actually bedridden and can't get out,  
7 the Bureau of Prisons does have a compassionate release  
8 statute. The U.S. Attorney has to agree with that; but  
9 typically, in my experience, if there's someone who's actually  
10:23AM 10 bedridden and can't get out of bed, then Bureau of Prisons  
11 doesn't want that person. And they tend to try to use that  
12 statute at that point in time. And I think the theory is  
13 you're not going to be very dangerous if you're in bed and  
14 can't do anything.

10:23AM 15 And certainly I will recommend the  
16 500-hour comprehensive drug program as well.

17 MR. KIMSEL: Thank you, Judge.

18 THE COURT: Anything else?

19 MR. KIMSEL: Your Honor, Mr. Ho has done some research  
10:23AM 20 about the facilities available in the Bureau of Prisons; and I  
21 believe he'd like to address that, which facilities, perhaps,  
22 he wants to -- he would ask to be put in.

23 THE DEFENDANT: Can I request different facilities?

24 THE COURT: Well, you can. Although, my -- my  
10:24AM 25 preference would be simply to make sure that they put you in a



1 facility that the Bureau of Prisons best believes can address  
2 this particular --

3 THE DEFENDANT: The disease.

4 THE COURT: -- disease, right.

10:24AM 5 THE DEFENDANT: Okay.

6 THE COURT: I think that's the best for you. They are  
7 experts in this. And I think once they're informed as to the  
8 disease and its progression to date, that they'll be best  
9 situated to make a -- make a recommendation.

10:24AM 10 My fear is if I recommend a particular place, that may  
11 be inconsistent in their view; and then they won't know which  
12 of the two to follow. So, I'd be inclined just to recommend a  
13 place best suited for your particular problem at this point in  
14 time.

10:24AM 15 THE DEFENDANT: Okay.

16 MR. KIMSEL: That seems appropriate, Your Honor.

17 Thank you.

18 THE COURT: All right. Mr. Inciong, anything further?

19 MR. INCIONG: Nothing further, Your Honor.

10:24AM 20 THE COURT: Mr. Kimsel?

21 MR. KIMSEL: Nothing further, Your Honor.

22 THE COURT: Thank you.

23 (Proceedings concluded at 10:24 a.m.)

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1 COURT REPORTER'S CERTIFICATE

2 I, Sharon Ross, Official Court Reporter, United  
3 States District Court, District of Hawaii, do hereby certify  
4 that the foregoing is a correct transcript from the record of  
5 proceedings in the above-entitled matter.

6 DATED at Honolulu, Hawaii, June 13, 2006.

7

8 /s/Sharon Ross

9 SHARON ROSS

10 CSR 432, RPR, CRR

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